Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

HOWARD RAY, CHARLES GALIPEAU AND TROY ALEXANDER,

Petitioners,

v.

JUDY GAIL IWANSKI, PERSONAL ADMINISTRATOR OF THE ESTATE OF DON DOUGLAS IWANSKI, DECEASED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL APPENDIX

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March 16, 2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE ESTATE OF DON DOUGLAS IWANSKI, deceased,	)	
Plaintiff,	)	
vs.	)	Case No.
LARRY FIELDS, Director of the Department of Corrections, et al.,	)	97-CV-103-B
Defendants.	)	

JUDGMENT

(Filed Jun. 19, 1998)

This matter having come on for hearing on Defendants' Motion for Summary Judgment, the Honorable Thomas R. Brett presiding, and the issues having been duly decided by separate order entered herein,

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that each party herein bear their own costs and attorney's fees.

DATED THIS 19th DAY OF JUNE, 1998.

/s/ Thomas R. Brett
THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE ESTATE OF DON DOUGLAS IWANSKI, deceased,	)	
Plaintiff,	)	Case No. 97-CV-103-B
vs.	)	ENTERED
LARRY FIELDS, Director of the Department of Corrections, et al.,	)	ON DOCKET DATE JUN 23 1998
Defendants.	)	

ORDER

Comes on for consideration Defendants' First and Second Motions for Summary Judgment filed November 7, 1997 and April 20, 1998 (Docket #'s 32 and 53) and the Court, being fully advised, finds as follows:

STATEMENT OF CASE

Judy Gail Poindexter Iwanski filed this action under 42 U.S.C. § 1983 on behalf of the estate of her son, Don Douglas Iwanski ("Iwanski"), who was incarcerated at the Northeast Oklahoma Correctional Center ("NEOCC") in Vinita from December 14, 1994 until his death on February 4, 1995. Kevin White ("White"), also an inmate at NEOCC, was convicted of murdering Iwanski by striking him in the head several times with a metal pipe which allegedly came from a bunk bed at NEOCC. Plaintiff names Larry Fields ("Fields"), former director of the Oklahoma Department of Corrections ("DOC"); John Middleton ("Middleton"), warden of NEOCC; Howard

Ray ("Ray"), deputy warden of NEOCC; Charles Gallipeau ("Gallipeau"), chief of security for NEOCC; Troy Alexander ("Alexander"), unit manager for NEOCC; and Randall Burke ("Burke"), a correctional officer at NEOCC, as defendants in their official and individual capacities.

Essentially, Plaintiff argues that Defendants violated Iwanski's Eighth Amendment right of freedom from cruel and unusual punishment and failed to provide appropriate medical care following the assault. Plaintiff further contends that Defendants failed to take reasonable actions to prevent Iwanski's murder at the hands of a fellow inmate. Plaintiff also brings a claim against the supervisory personnel alleging they failed to adequately supervise correctional personnel. Plaintiff seeks relief in the form of actual and punitive damages, as well as costs and attorney fees.

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT[1]

Pursuant to N.D. LR 56.1A., Defendants submitted a statement of undisputed material facts. This Court incorporates those undisputed material facts which the Court determined are supported by the record submitted in support thereof and lists additional undisputed facts

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[1] Undisputed facts have been modified where the Court determined the reference to the record does not fully support the fact asserted as stated. Plaintiff wholly failed to comply with the requirements of N.D. LR 56.1B., as more fully discussed at page 9 of this Order.

which aid in understanding the circumstances surrounding the incident which gave rise to this action as follows:

1. Iwanski and White were inmates confined at NEOCC, a minimum security facility operated by the DOC. Both inmates were classified minimum security.

2. Iwanski had previously been incarcerated with DOC for approximately two years. Both inmates were transferred into NEOCC from other facilities.

3. On or about February 4, 1995, Burke was assigned to drive the bus to transport inmates from Building 14, the housing unit in which Iwanski lived, to the dining hall and back. The dining hall was shared by inmates from Building 14 and Adams Hall, the housing unit in which White lived. Iwanski did not go to the dining hall that evening. At approximately 6:00 p.m., inmates boarded the bus to return to Building 14. White entered the bus and Burke questioned whether White was housed in Building 14. White replied by giving his name, DOC inmate number and answered "yes" he was housed in Building 14. In fact, he had been transferred to Building 10 and then to Adams Hall, the Eastern State Hospital Administration building, for reasons unrelated to Iwanski. Burke knew White and knew he had previously been housed in Building 14. Burke asked White to remain on the bus when they arrived at Building 14 in order to confirm that White was housed there.

4. Burke did not notice anything strange or unusual about White's behavior nor did Burke detect the odor of alcohol.

5. At approximately 6:05 p.m., the bus full of inmates arrived at Building 14. All the inmates exited the bus. Against Burke's previous order, White exited the bus, and Burke lost sight of him.

6. Burke exited the bus and entered the building. Shortly thereafter, Burke heard inmates yelling "man down" and immediately went to the area and discovered Iwanski injured, lying on his bunk. He was bleeding heavily about the head and making gurgling sounds. One of the officers called for emergency help. Burke, with help from other correctional officers, monitored the scene, checked on the other inmates, and prepared Iwanski for transport to the hospital.

7. The ambulance arrived at 1813 hours (6:13 p.m.). Burke assisted in getting Iwanski to the ambulance and performed CPR along with inmate Price while in route to the Craig County General Hospital. Iwanski was pronounced dead at 1840 hours (6:40 p.m.).

8. Numerous inmates apparently witnessed the assault and/or its immediate aftermath and also led prison officials to the weapon, a steel pipe approximately twenty-five (25) inches in length, one and one-half ($1^1/_2$) inches in width and weighing about four (4) pounds, which White had discarded in a new latrine at the front of the building following the attack.

9. White was found guilty of Iwanski's murder and sentenced to death. After the assault, it was determined that the attack was provoked by a dispute over gambling or drugs.

10. DOC and NEOCC have procedures by which an inmate in fear of physical harm at the hands of other inmates may request protection. Those procedures include seeking "separatees" from one or more inmates and/or protective custody.

11. Iwanski took no action with the DOC seeking protective custody or "separatees" from individual inmates.

12. Defendants were not aware of any dispute between Iwanski or other inmates at the time of the altercation. Defendants had no indication from Iwanski or any other source that Iwanski was in danger of any physical harm. There were no unusual circumstances or events that would have alerted Defendants or any prison official that Iwanski was in danger.

13. Iwanski's assigned case manager, Virginia Morris, had no knowledge or indication that Iwanski was in danger. She was unaware of any dispute between Iwanski and other inmates. She had used protective measures for inmates in the past when warranted.

14. Although Iwanski's mother has testified in her deposition that her son told her he was in danger, she did not notify nor did she ever attempt to notify any DOC employee to convey this information. No family member or friends of Iwanski notified any DOC employee that Iwanski was in fear for his life.

15. The DOC has established operational policies and procedures for the agency as a whole and issues sets of manuals that contain those policies and procedures for the overall operations of a correctional facility. In 1995,

the entire Oklahoma DOC was accredited by the American Correctional Association (ACA). The ACA is a professional organization which reviews states' correctional standards and compliance with standards which have been set by the ACA. Part of the accreditation process includes reviews of department operating policies and procedures.

16. Additionally, the DOC conducts a yearly review of all policies and procedures to review, update and revise the policies as necessary. The policies are reviewed and comments and suggestions are recommended. The executive staff of DOC then reviews the policies as well as the recommended changes. The policy then goes back to the responsible division for final review. It then comes back to executive staff and to the Director for final approval.

17. In addition to the DOC operations and procedures manual, the individual facilities implement a field manual for that particular facility based upon the requirements and guidelines of the DOC manual. For the field manual, each facility takes departmental policies and "operationalizes" them to fit the needs of that institution. For example, some facilities might have a farm unit while others do not. The field manual would reflect this individual facility distinction. The NEOCC manual is, in essence, a transparency of the DOC operations and procedure manual, with the exception of a few specific rules or regulations peculiar to NEOCC. In February 1995, NEOCC was in the process of compiling their field manual. When NEOCC was opened in December, 1994, the facility was operating under the DOC operations manual and field operations memorandum.

18. DOC requires its correctional officers to complete a six-week training program at the Center for Correctional Officer Studies which includes CPR training and emergency first aid training. There is also a yearly requirement of an additional 40 hours of training and part of the annual training includes training on various procedures of the facility and the agency. Managers of DOC must also attend yearly management training.

19. In order to ensure that employees receive their training, the DOC has a training department and each facility has a training officer who works jointly with the agency training department to ensure that training takes place.

20. DOC and NEOCC have rules and regulations concerning inmate behavior. Failure of an inmate to follow the rules and regulations could result in disciplinary charges being filed against the inmate. By DOC policy, gambling and possession and use of alcohol and drugs are prohibited. Inmates also remain subject to the laws of the state in which they are incarcerated.

21. In order to inform the inmates of policies and procedures of DOC and NEOCC, the inmates receive an orientation concerning the rules and regulations of the departments. The inmates are also informed of the disciplinary process.

22. In order to control contraband, it was the policy of NEOCC to conduct random shakedowns. Inmates were subject to searches at any time. They are also subject to random or suspect urinalysis testing, room inspections,

and physical body searches. Searches are done on a routine basis at random times. Random searches and shakedowns of a unit, common areas and bed searches are performed. Burke performed random shakedowns of inmates' living quarters, lockers and beds.

23. Correctional officers of NEOCC also performed "walk throughs" of the units to monitor inmate conduct and behavior. "Walk throughs" of the unit is a continuous process to tour the unit and see what activity is going on and to monitor inmate behavior. During a normal shift, Burke would make several walks of the unit to check the building and make sure everything was okay.

24. Burke was not aware of any inmate alcohol abuse, illegal drugs, gambling or possession of weapons at the time of the assault. If such action became known to Burke, he would stop the activity and take disciplinary action against the inmates. Defendants Alexander, Galipeau and Middleton were not aware of any inmate gambling and were not aware of any security problems at the facility.

25. In order to ensure that the DOC policies and procedures were being followed throughout the agency, Fields directed periodic audit teams to observe the running of an institution regarding policy compliance; the Department remained ACA accredited; there were investigations done from time to time; and, there were on-site personal visits by himself and his administrators. Fields states he personally conducted an on-site investigation and visit to NEOCC. Fields had a chain of command as to delegation of certain duties of overlooking specific facilities. Fields had several regional directors who were

assigned to specific facilities to advise Fields of the activities of a particular facility. The wardens of a particular institution reported to their assigned regional director.

26. In order to ensure that policies and procedures are followed by NEOCC, Middleton, Ray, and Galipeau made periodic walk throughs of all areas of the facility to observe and interact in the form of asking questions of staff, to determine how they handle certain matters and to provide monitoring compliance with established procedures. They also had daily morning briefings and every incident report was reviewed and discussed. Whatever issue or problems came up would be discussed and they would critique if any deficiencies were noted.

27. Ray would daily walk the units, making sure people were doing their particular job. His policy was to go into the dormitories and watch the officers as they conducted counts and/or shakedowns to ensure these were being done. Ray also would review incident reports to ensure that shakedowns were being done. Ray's normal working hours at the facility were usually from 6:30-7:00 a.m. and he sometimes wouldn't leave until 7:00-8:00 p.m. at night, sometimes 10:00.

28. Galipeau's daily routine would be to spend four hours in and out of all the housing units, walking the grounds looking for security problems and generally touring the facility. He would go into the units and tell the correctional officers to interact with the inmates.

29. In order to ensure officers were following procedures on his unit, Alexander during any given shift would walk the unit probably ten different times.

30. Inmates can also communicate requests to the staff, including the warden, when the inmate wants to report or complain that policy and procedure is not being followed. In turn, the facility reviews the request, investigates and provides a written response.

31. Another way of ensuring that staff was following procedures, from time to time, either the deputy warden or warden might direct that there would be an inspection or an audit of a specific area or function of the facility in order to assess level of compliance with policies.

32. In February, 1995, NEOCC had been in operation for approximately two months. The fatal assault on Iwanski was the first and the only fatal assault of an inmate at NEOCC.

33. No employee of NEOCC received any employment discipline as a result of the subject assault.

34. Both Iwanski and White were serving sentences, at least in part, for assault and battery and therefore had constructive and actual knowledge that this constituted prohibited behavior under the laws of the state of Oklahoma.

Defendants have supported their statement of undisputed facts with attached evidentiary material, referring "with particularity to those portions of the record before the court upon which movant relies," as required by N.D. LR 56.1A.

In response to Defendants' statement of uncontroverted facts, Plaintiff merely presents a list of facts claimed to be disputed, wholly failing to cite to evidence

in the record to sustain a material factual dispute. A mere recitation that a fact is controverted, without supporting authority, is not sufficient to create a controverted fact. N.D. LR 56.1B., provides in pertinent part:

> "The response brief to a motion for summary judgment . . . shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."

Plaintiff has wholly failed to comply with N.D. LR 56.1B.

The local rule was promulgated to allow the Court and the parties to efficiently determine what material issues of fact remain to be determined by the trier of fact at the conclusion of discovery. If Plaintiff will not or cannot articulate and provide timely controverted evidentiary support for such issues of fact on the eve of trial, this Court has an obligation under Fed. R. Civ. P. 56 to summarily dispose of unwarranted claims.

Recognizing that this Court and the parties are best served when matters are decided on their merits, the Court has independently reviewed the statement of undisputed facts submitted by Defendants and finds them supported by the record. In reaching a decision on

the merits, the Court has also considered Plaintiff's evidentiary matter attached to the response brief, for the purpose of determining what, if any, material fact issues remain. The Court concludes that Defendants are entitled to entry of summary judgment under the uncontroverted facts presented by the record.

SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving part is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated: "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts . . . " Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
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> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

ARGUMENTS AND AUTHORITY

Defendants' submit the following propositions in their motions for summary judgment: (I) Plaintiff's civil rights claim against Defendants in their official capacity must be dismissed; (II) Defendants are protected by qualified immunity; (III) Plaintiff's Eighth Amendment rights were not violated; and, (IV) the undisputed facts fail to show supervisory liability.

Proposition I: Official Capacity

Defendants argue that Plaintiff's civil rights claim against them in their official capacity must be dismissed because the Eleventh Amendment provides the states with immunity from actions brought in federal courts unless the state has waived its immunity. Defendants correctly assert that suits filed against state officials in their official capacity are not considered suits against the individual officer but rather are suits against the office. *Will v. Michigan Dep't of State Police, et al.*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Defendants further assert that the state of Oklahoma has not waived its Eleventh Amendment immunity. The State of Oklahoma has waived its sovereign immunity from liability of the torts of its employees only as set forth in The Governmental Tort Claims Act. *Okl. Stat.* tit. 51 §§ 151, et seq. (1992 & Supp. 1994). However, the act clearly states that the state reserves its Eleventh Amendment immunity. *Okl. Stat.* tit. 51, § 152.1 B. (1992).

Plaintiff, who brings this action under U.S.C. 42 § 1983, argues that suits against government officials in their official capacities are appropriate if the custom or policy of the agency in question played a role in violating a federal law. Plaintiff relies on *Hafer v. Melo*, 502 U.S. 21 (1991), to support this proposition. *Hafer*, which involved a suit against a state official in her personal, not official, capacity, is not dispositive here because its reference to the "custom or policy" of the agency derives from *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978). The defendant in *Monell*, however, was an agency of a municipality, and the court concluded that

municipal corporations were "persons" subject to suit under § 1983. *Id.* at 2034.

Plaintiff has offered no legal authority for the proposition that the states are also "persons" who can be sued for nonprospective relief under § 1983. "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant." *Papasan v. Allain,* 478 U.S. 265, 278 (1986). Nor has Plaintiff advanced any argument that Congress intended to abrogate the states' Eleventh Amendment immunity when it passed § 1983 "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Dellmuth v. Muth,* 491 U.S. 223, 227 (1989) (quoting *Atascadero State Hospital v. Scanlon* 473 U.S. 234, 242 (1982)). No such language is apparent in § 1983.

Plaintiff argues that certain DOC and NEOCC policies or customs, or the lack thereof, are sufficient to establish a genuine issue of material fact as to Defendants' official capacity liability. This argument is not persuasive, given the existing state of the law with respect to the states' sovereign immunity. Based on the foregoing, Defendants' motions for summary judgment with respect to Defendants' official-capacity liability should be GRANTED.

Proposition II: Qualified Immunity

Defendants also move for summary judgment on the theory that they are protected by qualified immunity.

Government officials performing discretionary functions are protected by qualified immunity unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). Motions for summary judgment founded upon qualified immunity must be analyzed under a two-part framework. The court must determine "whether the plaintiff has asserted a violation of a constitutional or statutory right," and then must decide whether that right was clearly established such that a reasonable person in the defendant's position would have known the conduct violated the right. *Davis v. Gracey*, 111 F.3d 1472, 1477 (10th Cir. 1997) (citing *Garramone v. Romo*, 94 F.3 1446, 1449 (10th Cir. 1996)).

Plaintiff cites *Farmer v. Brennan*, 511 U.S. 825, 933 (1994) to the effect that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners," as proof that Iwanski had a clearly established right under the Eighth Amendment to be protected from White when the attack occurred in February, 1995. Defendants' positions is that the "contours" of this right were not sufficiently clear that a reasonable person in a Defendant's position would have realized he was violating the right.

This court concludes that Iwanski had a right to protection, but that Defendants acted reasonably in view of all the circumstances to provide that protection. "If the law was clearly established, the immunity defense should ordinarily fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

Defendants state that "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." Quoting *Davis v. Scherer*, 468 U.S. 183, 190 (1984). "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' *Id.* at 191. Defendants essentially contend that their conduct meets the "objectively reasonable" test. Among the undisputed facts Defendants provide to support this argument are depositions indicating: (1) neither they nor any other officials with the DOC or NEOCC were aware that Iwanski was in any danger of being attacked, (2) Iwanski took no action with the DOC seeking protective custody, (3) White's attack on Iwanski was sudden and unannounced, (4) the NEOCC is a minimum security facility and both Iwanski and White were classified as minimum security inmates, (5) DOC has established policies and procedures for the agency's operation and issues manuals containing those policies and procedures for the operation of a correctional facility and, (6) when NEOCC opened, it was operating under the DOC operations manual and field memorandum.

Plaintiff disputes these facts with statements made during depositions indicating: (1) NEOCC had no field operations manual in place when Iwanski was transferred there, (2) neither the DOC nor the NEOCC had any regulations expressly prohibiting the use of metal pipes as weapons, (3) neither the staff nor the prisoners at NEOCC were familiar with the DOC regulations

allegedly in force at the facility when IWANSKI was killed and, (4) NEOCC had no facilities in February, 1995 to house prisoners who believed they were in danger. Plaintiff contends that these and other statements provided in the record indicates that Defendants' conduct was not "objectively reasonable" and that summary judgment therefore should be denied.

The Court finds Defendants are entitled to summary judgment on the issue of qualified immunity for the reason that their conduct under the circumstances was "objectively reasonable" Plaintiff has wholly failed to establish that any prison official was ever advised by Iwanski or anyone else that he feared for his safety. The only testimony from anyone regarding this is from Iwanski's mother, who claims to have been told by her son he feared for his safety during a visitation on the day of his death. Although present at the prison at the time this information was given to her, the mother did not advise or make inquiry of prison officials nor did she attempt to contact anyone outside the prison to determine whether anything could be done for her son. At some earlier date in January, 1995, Iwanski's mother had supplied a money order to another inmate on her son's behalf for what she believed to be a gambling debt yet there is no evidence that she advised or conferred with anyone at the prison regarding what policies were in place to prevent the illegal activity which she alleges led to her son's death. There is no evidence that the named Defendants herein knew of this activity. Further, there is no indication that correction officer Burke should have been alerted by his observation of White, in what he suspected to be the wrong area, to the fact that White

intended to commit an act of violence toward another inmate. White was dressed in the color required to be worn by the inmates of that unit and inmate unit transfers were not unusual events. Nor would it arouse suspicion for an inmate to be wearing a coat in early February in Northeastern Oklahoma under which he may have something concealed. Additionally, while a metal pipe can be a dangerous weapon capable of killing, so can many other articles present at a construction site housing minimum security prisoners.

Viewing all the evidence and inferences in a light most favorable to Plaintiff, summary judgment is appropriate as to this claim and Defendants' motions should be GRANTED.

Proposition III: Eighth Amendment

Plaintiff alleges Defendants violated Iwanski's Eighth Amendment rights by failing to adequately protect him from White's assault and by failing to provide appropriate medical care following the assault. Defendants assert that the undisputed facts fail to establish that Iwanski's Eighth Amendment rights were violated. Defendants' statement of undisputed facts includes references to the record indicating that Defendants were unaware of any threat to Iwanski, that NEOCC was operating under the DOC operations manual when it opened in December, 1994, that correctional officers must complete six weeks of training before they are assigned to a facility and must also undergo additional training on a yearly basis. Defendants also provide references to the record indicating that officials at NEOCC conducted random shakedowns and

searches of inmates, that NEOCC administrators walked through the facility regularly to ensure that certain policies and procedures were followed, and the NEOCC inmates are informed of the DOC's and the facility's rules and regulations.

The statement of disputed facts contained in Plaintiff's response, again, contains no references to the record disputing Defendants' claims. Plaintiff's brief, however, does contain references to the record which attempt to raise genuine disputes with respect to both the assault and medical care allegations. For example, Plaintiff's affiant Ricky Price (Price), who was also incarcerated at NEOCC at the time, states that he received no orientation regarding NEOCC policies when he was transferred to the facility in December 1994. This contradicts a statement provided by Middleton in his deposition indicating that inmates receive an orientation regarding the rules and procedures of the DOC and of the individual facility. It does not however establish whether Iwanski had received this orientation at this or any other facility. There is no evidence that Iwanski was unaware of rules and regulations which would have allowed him to seek protection.

Price also states that inmates at NEOCC had "free access to pipes, bricks, nails and other construction material . . . "when he was incarcerated at the facility. Price states that NEOCC had no established policies and procedures between December, 1994, and February, 1995, that correctional officers and officials at the facility had insufficient medical training, and that there were no medical personnel on duty at NEOCC when White attacked Iwanski. Burke testified that he had training in CPR and

first aid at the academy. It was Burke who worked along with Price to administer CPR and emergency care on the way to the hospital and Price does not question the care provided by Burke in that situation.

Price also states that correctional officers and officials at the facility offered no immediate medical assistance to Iwanski after the attack and that approximately 45 minutes expired between the time of the attack and the arrival of an ambulance. Plaintiff has not established Price as an expert in the medical field in which he attempts to provide testimony. The court has nothing before it to show to what extent Price was trained by the military as a medic and if that training went beyond the CPR which he helped administer to Iwanski. Further, even if this court accepts Price's statement that 45 minutes expired before professional medical aid was provided to Iwanski, which contradicts all other documentary evidence and oral testimony in the case, 45 minutes does not in itself support a claim of deliberate indifference in furnishing medical treatment under the Eighth Amendment. *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); and *Caldwell v. District of Columbia,* 901 F.Supp. 7 (D.D.C. 1995). Nor has Plaintiff established that Price is competent to offer expert testimony about whether Iwanski would have survived, had medical assistance been different following the attack. Fed.R.Civ.P. 702. The attack on Iwanski, which consisted of at least six blows directly to the head, apparently came when he was sleeping or at least unsuspecting of what was about to transpire. When found, Iwanski was lying with considerable blood on his face, making only

gurgling sounds. There is no competent evidence in the record that any particular timely medical care would have saved Iwanski's life.

Plaintiff's response also refers to statements made by DOC and NEOCC officials indicating that NEOCC did not have a local policy manual in place in February, 1995, that officials at NEOCC received no training regarding any local rules governing the facility's operation, and that officials did not secure the steel pipes that were removed from the bunk beds, one of which White allegedly used in the assault on Iwanski.

Plaintiff fails to recognize that the technical incompleteness of the NEOCC field manual at the time this facility was opened did not leave the facility without appropriate policies and procedures. Plaintiff overstates the importance of the field manual and understates the importance of the DOC operations and field manuals under which the facility was operating. The staff had been trained under DOC policies and procedures. The NEOCC field manual, when completed, was a virtual transparency of the DOC manual which appropriately dealt with the issues and conduct involved.

"[A] prison official may be liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer,* 511 U.S. at 847. A prison official's knowledge of a substantial risk may be inferred from circumstantial evidence. *Id.* at 842. "[A] fact finder may conclude that a prison official knew of a

substantial risk from the very fact that the risk was obvious." *Id.*

The Court concludes there were no conditions or circumstances at NEOCC, known to prison officials, or of which they should have been aware, that Iwanski's personal safety or life was in danger. Therefore, Defendants' motions for summary judgment with regard to both the assault and medical care issues regarding the Eighth Amendment claim, should be GRANTED.

Proposition IV: Supervisory Liability

The supervisory Defendants contend that they are entitled to summary judgment because the undisputed facts show no supervisory liability. Again, Defendants rely on those undisputed facts indicating DOC policies governed the operations of NEOCC when Iwanski was killed. Defendants' statement of undisputed facts also indicates that the DOC received an accreditation from the American Correctional Association in 1995 and that DOC conducts a yearly review of its policies and procedures, updating and revising them as necessary. None of these facts are disputed by Plaintiff.

Plaintiff asserts Defendant Fields failed to ensure that a local field operations manual was enacted for NEOCC when Iwanski and White were transferred there, and that the DOC policy governing the facility was inadequate because it failed to restrict an inmate's possession of a steel pipe. Plaintiff asserts Defendant Middleton is liable because he failed to establish operation procedures at NEOCC. Specifically, Plaintiff asserts that NEOCC had no regulations prohibiting inmates' possession of "green

money," drugs or alcohol, nor regulations prohibiting gambling, activities which Plaintiff contends played a role in Iwanski's murder. In sum, Plaintiff asserts that the policies implemented by Fields and Middleton were so inadequate that they amounted to a deprivation of Iwanski's Eighth Amendment rights. The evidence in the record does not support this assertion.

"[A] supervisor may be held liable if there exits either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Thompkins v. Belt,* 828 F.2d 298, 304 (5th Cir. 1987). "Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Id.*

Defendants argue that Plaintiff has failed to show that any DOC policy amounts to a repudiation of a constitutional right. Defendants characterize Plaintiff's argument as an allegation that Defendants deviated from the DOC policy, resulting in a constitutional violation. Plaintiff, however, appears to argue that the policies implemented by Fields and Middleton were sufficiently deficient to find Fields and Middleton liable.

Plaintiff further asserts that Defendants Ray, Alexander, and Gallipeau were personally involved in violating Iwanski's Eighth Amendment rights. Plaintiff contends Ray failed to ensure that correctional officers

were knowledgeable about NEOCC's policies and procedures, failed to ensure the staff received adequate medical training and failed to ensure the staff was sufficiently trained to cope with emergencies. The evidence does not support these assertions. There is no specific policy to which Plaintiff refers which directly caused or encouraged the apparent sudden unprovoked attack. Further, there is no competent medical evidence in the record to establish that the emergency care provided to Iwanski was improper or that other appropriate care would have saved or prolonged his life. Burke and other staff were trained in CPR and first aid at the academy. Both inmates were well aware that Oklahoma law prohibits assault and battery because both inmates were serving time for that offense.

Plaintiff asserts that Alexander and Gallipeau took no action to secure the pipes that had been removed from the bunk beds and failed to ensure that correctional officers properly supervised the inmates at NEOCC. These bald assertions, when viewed in light of the uncontroverted facts herein, do not provide a legally sufficient link to create an inference of proximate cause for Iwanski's death.

In conclusion, viewing all the evidence and inferences in a light most favorable to the nonmovant, and for reasons previously stated herein, Defendants are granted summary judgment.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment are hereby GRANTED.

DONE THIS 19th DAY OF JUNE, 1998.

/s/ Thomas R. Brett
THE HONORABLE
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE